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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

ERNEST F. CLOSE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit reversing the conviction of respondent for refusal to submit to induction into the armed forces.

OPINION BELOW

The opinion of the Court of Appeals (Appendix, *infra,* pp 1a-9a) is reported at 215 F. 2d 439.

JURISDICTION

The judgment of the Court of Appeals was entered June 10, 1954 (Appendix, *infra,* p. 10a). A

petition for rehearing was denied September 28, 1954 (Appendix, *infra,* p. 11a). On October 26, 1954, Mr. Justice Minton extended the time for filing a petition for a writ of certiorari to and including November 27, 1954 (Appendix, *infra,* p. 12a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether there was a basis in fact for the denial to respondent, a member of Jehovah's Witnesses, of a draft classification as a conscientious objector, where he indicated that he was not pacifistic but that he would not submit to any secular governmental authority.

STATUTE INVOLVED

Section 6(j) of the Universal Military Training and Service Act, 62 Stat. 604, 612; 65 Stat. 75, 86 (50 U. S. C. App. 456(j)), provides in pertinent part:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely per-

sonal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are

found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

STATEMENT

The United States seeks review of the judgment of the Court of Appeals for the Seventh Circuit reversing respondent's conviction for refusal to submit to induction into the armed forces, the court holding that the record revealed no basis in fact for denial of respondent's claim to be a con-

scientious objector. Respondent had been found guilty in the District Court for the Southern District of Indiana by the court without a jury (R. 3, 22-23) and sentenced to imprisonment for three years (R. 23-24).

Respondent's selective service file, which was admitted in evidence as government's Exhibit 2 (R. 32, 68-144), reveals the following:

He registered on September 17, 1948, stating his occupation to be that of a student of electrical engineering at Purdue University Extension (R. 69). In his classification questionnaire, filed on November 9, 1949, he stated that he was a conscientious objector and that he was disqualified for service by reason of a fast heart (R. 71-73). He supported the former claim by filing, on November 15, 1949, the special form for conscientious objectors in which he identified himself as a Jehovah's Witness and relied upon numerous Biblical quotations (R. 76-81).

On November 15, 1949, registrant was classified I-A (R. 74). On November 26, 1949, he appealed (R. 82), and on April 25, 1950, was reclassified I-A-O, *i. e.,* available for noncombatant service (R. 74). On May 5, 1950, he objected to this classification and requested an interview (R. 82-83), but his letter was treated as an appeal. The appeal board referred the case to the Department of Justice (R. 74, 84).

On February 1, 1951, he wrote explaining more

fully the nature of his beliefs (R. 85-87), stating as follows (R. 86):

> True, in the days before Christ's coming, God's chosen people took up arms to attack their enemies, but this was done only under the guidance and direction of Jehovah. Thus, while they were not pacifists, they took no part in the wars of the world. Like these faithful ones of old, I am not pacifistic but am conscientiously opposed to participation in worldly wars.

A hearing before a Department of Justice hearing officer was held on March 27, 1951 (R. 101). The officer reported as follows as to registrant's statements of his beliefs (R. 103):

> Registrant stated that he should not help, hinder *of* [sic] interfere with the political affairs of the nations of the world: That such action was opposed to the will of God: that to participate in hospitalization in connection with the war would be to take part in the affairs of nations and thus wrong in the eyes of God. That he didn't oppose the Draft Law but desired deferment as a Conscientious Objector.

The hearing officer's report referred to affidavits enclosed in the file which indicated registrant's sincerity and activity as a Jehovah's Witness (R. 104).

The hearing officer also reported that the F. B. I. had interviewed 17 persons, and that their opinions ranged from attestations of sincerity to "Doesn't want to disturb education," and "surprised to hear he is a conscientious objector." (R. 104.)[1] He himself concluded that registrant was a man "who quotes all portions of New Testament which are helpful to him;" that he "would be, in all likelihood," deferred as a student; and that he was "at least one Jehovah's Witness who has sincerely practiced his religion for years and is entitled to a classification of I-O" (R. 104-105).

The Department of Justice disagreed with the hearing officer's conclusion. The Department, citing the article, "Why Jehovah's Witnesses Are Not Pacifists," The Watchtower, February 1, 1951, concluded that registrant's religious grounds did not include opposition to all forms of war (R. 100-

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[1] The hearing officer supplied registrant with a memorandum of adverse information, as follows (R. 143-144):

"(1) Friends and acquaintances of yours who have known you indicate that you have never expressed any opposition to the drafting of men or to war.

"(2) Others express the opinion that you are insincere in your beliefs and that you are more animated by a desire not to disturb your education.

"(3) Some others express the opinion that you are by nature contentious and will object for the pleasure and mere sake of objecting.

"(4) Others express astonishment that you hold yourself to be a conscientious objector.

"(5) Others express the opinion that you are advancing the thought of your Mother, which may or may not be your sincere thought, when you state that you are opposed to war."

101).[2] The appeal board, on August 7, 1952, reclassified registrant I-A (R. 74, 105).

On August 19, 1952, registrant requested a reopening of the classification upon the basis of facts not theretofore considered, that is, his student ministry since April 1951 (R. 106-108). On November 12, 1952, upon complaint of registrant, state headquarters of the Selective Service System instructed the local board to afford registrant a hearing pursuant to his request of May 5, 1950 (*supra*, p. 5) (R. 114-115, 130). On November 25, 1952, at the hearing before the local board, registrant presented written statements to support his claim to exemption as a minister.[3] A classification of I-A was entered (R. 75, 130). On appeal, the appeal board, on January 21, 1953, classified registrant I-A (R. 126). He then wrote to the National Director urging an appeal to the President (R. 128-132). National headquarters found no facts warranting further action regarding the classification (R. 135).

On April 28, 1953, registrant refused to be inducted (R. 139-141).

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[2] The record is not clear when or by whom this publication was introduced, but it now appears as part of registrant's selective service file, although it was not reprinted as part of Government's Exhibit 2 (R. 68-144). It is not referred to as "Documentary Evidence" before the hearing officer (R. 104). However, the registrant in a later affidavit referred to the article and expressed views consistent with it (R. 14-15).

[3] Although the respondent continued to make this claim at the time of trial (R. 17), he abandoned that position before the court below (see Appellant's Brief, pp. 10, 30, and Reply Brief, p. 6 in the Court of Appeals).

REASONS FOR GRANTING THE WRIT

It is impossible to reconcile the opinion below with the decision of another panel of the same circuit in *Sicurella* v. *United States,* which is now before this Court, No. 250, this Term. In the *Sicurella* case the court held that willingness to use force in defense of "Kingdom Interests" and an expressed opposition to all forms of governmental authority were appropriate factors to be considered by the selective service board in denying claims of conscientious objection; in the instant case, where the same factors are present to an even greater degree, the court has ruled that the record does not support a I-A classification. In so doing, the instant decision expressly follows *United States* v. *Taffs,* 208 F. 2d 329 (C. A. 8), certiorari denied, 347 U. S. 928, which the court in the *Sicurella* case recognized as in conflict with its decision in that case. As we pointed out in acquiescing in the grant of certiorari in the *Sicurella* case, the essence of the question in these cases is whether sincere adherence to the tenets of Jehovah's Witnesses, as expressed in the pronouncements of the sect, with no indication that the individual registrant has personal views going beyond the official pronouncements, is sufficient to establish that the registrant is opposed to "war in any form" and entitled to classification as a conscientious objector. On this basic question, two different panels of the Seventh Circuit have reached opposite results, and since the matter is before the Court in the *Sicurella* case, the instant

petition is filed in order to have the conflict resolved by this Court.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

NOVEMBER, 1954.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1953, APRIL SESSION, 1954

No. 11085

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ERNEST F. CLOSE, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

June 10, 1954

Before MAJOR, Chief Judge, SWAIM and SCHNACKENBERG, Circuit Judges

SWAIM, *Circuit Judge:*

The defendant, Ernest F. Close, was convicted of violating the Universal Military Training and Service Act, 50 U. S. C. A. App. Sec. 451, et seq., by refusing to submit to induction into the armed services of the United States. In this appeal the defendant contends that his final classification of I-A (available for military training and service), under which he was ordered to submit to induction, was invalid and that, therefore, his refusal to submit to induction was not a violation of 50 U. S. C. A. App. Sec. 456. The defendant's classification questionnaire showed that he was a Purdue Uni-

versity student studying electrical engineering, that he was a conscientious objector and that he had asked to be so classified.

On November 15, 1949, the defendant, by mail, filed with the local board the regular Selective Service System Form 150 in which he stated that he was, because of his religious training and belief, conscientiously opposed to war in any form; that he was also opposed to participation in non-combatant training and service in the armed forces; and that his belief in a Supreme Being involved duties which to him were superior to any duties arising from any human relation. In this statement the defendant cited and quoted various passages from the Bible on which he relied for support of his position. He explained that he had received his religious training by reading and studying the Bible and by using the Bible helps published by the Watchtower Bible and Tract Society, and from attending meetings of Jehovah's Witnesses for about ten years. In this same form the defendant stated that he considered that his work for Jehovah's Witnesses had demonstrated his religious convictions; gave a list of the names and addresses of individuals who could supply information as to the sincerity of his religious convictions; stated that his mother was a member of Jehovah's Witnesses; and gave his reasons for never having theretofore publicly expressed his views as to participation in war in any form. On the same day that the local board received this Form No. 150 from the defendant it classified him

as I-A. The registrant, by letter, remonstrated against this classification and requested an interview with the local board.

In April 1950 the local board changed the defendant's classification to I-A-O, available for noncombatant military service only), thereby indicating the belief of the local board in the sincerity of his claim to exemption from combatant service. Defendant, by letter, complained of this classification and again explained to the board that he was "conscientiously opposed to participation in war or in any phase of military service." In this letter he also requested a personal appearance before the board. The local board considered this to be a request for an appeal and accordingly forwarded the defendant's file to the appeal board. The appeal board, after having made a preliminary determination that the defendant was not entitled to a conscientious objector classification, referred the case to the Department of Justice for inquiry and hearing.

On March 27, 1951, the defendant appeared before the designated hearing officer, explained his beliefs and the reasons therefor and submitted affidavits in support of his claim. After consideration of the case the hearing officer concluded and recommended: "It is my opinion that Registrant is at least one Jehovah's Witness who has sincerely practiced his religion for years and is entitled to a classification of I-O [conscientiously opposed to participation in military service, combatant or non-combatant]."

Thereafter, however, on July 23, 1952, T. Oscar Smith, Special Assistant to the Attorney General, directed a letter to the appeal board in which he stated: "* * * Conceding that the registrant bases his claim upon religious grounds, he is, nevertheless, not entitled to exemption as a conscientious objector because those grounds do not include opposition to war in any form. On the contrary, the article, 'Why Jehovah's Witnesses Are Not Pacifists,' The Watchtower, February 1, 1951, which was offered in evidence by the registrant as explanatory of his beliefs, clearly shows that the sect does not teach opposition to all forms of war. * * * Since the registrant has failed to establish his entitlement to the exemption within the meaning of section 6(j), Universal Military Training and Service Act, it is recommended that the claim be denied."

Pursuant to the recommendation of the Assistant Attorney General, the appeal board denied the defendant's claim to clasification as a conscientious objector and again placed him in class I-A. His file was then returned to the local board on August 11, 1952, and the defendant was notified of the classification. On receipt of this notice the defendant wrote a letter to the local board requesting that his classification be reopened and that a IV-D (ministerial) classification be given to him because he had then become a student preparing for the ministry. The local board refused to reopen his classification and ordered the defendant to report for induction December 26, 1952.

A review of the defendant's file by state headquarters revealed that the local board had failed to grant the defendant a personal appearance, as he had requested, and the local board was then ordered to reopen the classification. When notified of this hearing before the local board the defendant wrote a letter to the board stating that in the meantime he had become an ordained minister and his letter was accompanied by various certificates and affidavits signed by several persons. The defendant appeared before the local board in person on November 25, 1952. At that time he stated that he wanted to present new evidence concerning his having become an ordained minister. Defendant presented extensive documentary evidence to the board but the board made an entry on his file, "I-A Affirmed." Defendant appealed from this classification on the ground that he was a minister. The appeal board again classified him I-A and returned his file to the local board.

Pursuant to the order of the local board, the defendant, on March 18, 1953, appeared at the induction center but refused to be inducted.

In this case there was no affirmative evidence before the local board to contradict the evidence furnished by the defendant as to the sincerity of his beliefs as a conscientious objector unless the F. B. I. report may be considered as such evidence. In *Dickinson* v. *United States,* 346 U. S. 389, 396, the Supreme Court held that the local board was not free to disbelieve a registrant's testimonial and documentary evidence as to his sincerity in the ab-

sence of any impeaching or contradictory evidence. The court there said, page 397: "But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

Nor do we believe that the F. B. I. report on this defendant furnished an evidentiary basis for the denial of the exemption claimed by the defendant. The F. B. I. report described interviews with various persons whose views varied as to the sincerity of the defendant's claim for exemption as a conscientious objector. But the reasons for the opinions expressed in the interviews were not shown. As the court said of such unsupported opinions in *Annett* v. *United States,* 10 Cir., 205 F. 2d 689, 691: "To merely state that he does not consider him sincere without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence." In this case the Government stresses the fact that the defendant had not given public expression to the beliefs on which he based his claim to exemption. That fact was also present in *Weaver* v. *United States,* 8 Cir., 210 F. 2d 815, 819, but the court there apparently did not consider it important.

Nor do we find merit in the contention that the defendant abandoned his claim to conscientious objector status by appealing only on the denial to classification as a minister. As the court said in

Pine v. *United States,* 4 Cir., — F. 2d — (April 5, 1954), "It is absurd to assume that appellant intended to abandon his claim to exemption as a conscientious objector because he sought by his appeal the more complete exemption allowed ministers of religion * * *." Memorandum No. 41, issued November 30, 1951, by the Selective Service System Headquarters, as amended August 15, 1952, expressly provides that an appeal by a registrant solely on the basis that he is entitled to ministerial status does not constitute withdrawal of his claim as a conscientious objector. *Jewell* v. *United States,* 6 Cir., 208 F. 2d 770, 771.

A consideration of the entire Selective Service file in this defendant's case convinces us that his final classification of I-A, under which he was ordered to submit to induction, may be attributed solely to the written opinion submitted to the appeal board by the Department of Justice.

There was a personal appearance by the defendant on his appeal only before the hearing officer of the appeal board. It was this hearing officer who, after reviewing the defendant's file and after talking to the defendant, thought that the defendant was sincere in the beliefs on which he based his claim to a conscientious objector classification. The hearing officer, therefore, recommended that the defendant be so classified. If the appeal board had followed the recommendation of the hearing officer, the defendant would have been classified I-O and would not have been subject to induction. Instead, the appeal board followed the "advisory"

recommendation of the Department of Justice and classified the defendant as I-A.

It is clear from the letter written by the Special Assistant of the Attorney General to the appeal board that his legal opinion that the defendant was not entitled to a conscientious objector classification was based on the belief that the defendant, as a member of Jehovah's Witnesses, was not a pacifist, was not opposed to participation in theocratic wars, and was not opposed to fighting in self-defense and, therefore, was not "opposed to participation in war in any form," as that phrase is used in Section 6(j) of the Act. Many recent decisions have held that such an interpretation of this section of the Act is erroneous. *Annett* v. *United States,* 10 Cir., 205 F. 2d 689; *United States* v. *Pekarski,* 2 Cir., 207 F. 2d 930; *Taffs* v. *United States,* 8 Cir., 208 F. 2d 329; *United States* v. *Hartman,* 2 Cir. 209 F. 2d 366, 370; *Jessen* v. *United States,* 10 Cir., — F. 2d — (May 7, 1954); *United States* v. *Hagaman,* 3 Cir., — F. 2d —— (May 13, 1954). As to this contention, the court said in the *Taffs* case, *supra,* page 331: "However , we are inclined to think that Congress did not intend such an unreasonable construction to be placed on this phrase. War, as we know it, and as the term is ordinarily used, means a flesh and blood conflict between nations; it is a struggle of violence by one political entity seeking to overcome or overthrow another political entity. Manifestly, Congress was legislating in regard to this type of conflict and was not, indeed, could not, concern itself with theocratic wars—that is, wars carried on

by the immediate direction of God. The words 'in any form,' obviously relate, not to 'war' but to 'participation in' war. * * *"

Since the final I-A classification of the defendant was based on this erroneous construction of the statute, the classification was invalid and did not require the defendant to submit to induction. The defendant's motion for acquittal should have been granted.

The judgment of the District Court is REVERSED and the cause is remanded with instructions to dismiss the indictment.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Thursday, June 10, 1954

Before

Hon. J. Earl Major, Chief Judge
Hon. H. Nathan Swaim, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

No. 11085

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ERNEST F. CLOSE, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and that this cause be, and it is hereby REMANDED to the said District Court with instructions to dismiss the Indictment.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Tuesday, September 28, 1954

Before

Hon. J. Earl Major, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

No. 11085

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ERNEST F. CLOSE, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby, DENIED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. —

UNITED STATES OF AMERICA, PETITIONER

vs.

ERNEST F. CLOSE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 27th, 1954.

(S.) SHERMAN MINTON,
Associate Justice of the Supreme Court of the United States.

Dated this 26th day of October, 1954.

U. S. GOVERNMENT PRINTING OFFICE: 1954 921267